82-1321

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KASE HIGA, JUDGE OF THE SECOND CIRCUIT
STATE OF HAWAII, *Petitioner*,

v.

RORY MAYO, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Double Jeopardy clause of the Fifth Amendment bars retrial of a state defendant where the trial court declares a mistrial sua sponte because of "a commendable concern that the impartiality of the proceedings be unimpeached."

2. Whether a criminal defendant may successfully invoke the Double Jeopardy clause where his own conduct in offering a gift to the trial judge brought about the court's sua sponte mistrial ruling.

LIST OF PARTIES AFFECTED

Except for the persons listed in the caption, there are no other parties affected by this case.

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner KASE HIGA, Judge of the Second Circuit, State of Hawaii, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is attached to this Petition as Appendix A. That decision affirmed the judgment of the District Court for the District of Hawaii, published as *Mayo v. Attorney General*, 528 F.Supp. 883 (1981) and attached hereto as Exhibit B.

The decision of the Hawaii Supreme Court in *State v. Mayo*, 62 Haw. 108, 612 P.2d 107 (1980) is attached hereto as Exhibit C.

JURISDICTION

The final judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 9, 1982.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fifth Amendment.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Respondent was indicted for the offenses of Rape and Kidnapping by the Maui grand jury, and trial was set for April 2, 1979, before the Honorable S. George Fukuoka in the Circuit Court of the Second Circuit. On the morning of April 2, 1979, before trial had commenced, the judge called both attorneys into chambers for the following reported conference:

> THE COURT: Okay now, this has to do with a case that's going to trial this morning: Rory Mayo's case. I just remembered it. I'd almost forgotten about it; but I just want to disclose to Counsel about a fact. About

a month or two ago, I don't even remember exactly the time, Rory Mayo and a woman friend came to my home to offer me something in a package as a gift. There was no explanation made other than they wanted to give me a gift, and, of course, I declined and said I was in no position to accept anything of that sort. And they kind of, you know, tried to persuade me to accept it, and I finally convinced them that I cannot accept it, and they left.

Now, I don't think it means anything very much but I thought I better let you people know. As a matter of fact, I thought about it this morning, and then I thought "Now, should I disclose it before the trial or after the trial?" and I decided I better do it before the trial, So that's it.

MR. LOWENTHAL: Has it affected your feelings at all about him or the case?

THE COURT: Well, I have feelings about it, but I don't think it will affect the case.

MR. LOWENTHAL: Okay.

THE COURT: Okay, anything else, so long as we're together?

Appendix B. No objections were made to Judge Fukuoka's hearing the case.

Following the in-chambers discussion, court was convened; the jury panel was sworn and a jury selected; opening statements were made; and the prosecution called two preliminary witnesses for testimony. During voir dire and opening statement by defense counsel it had been suggested that the Defendant Mayo would take the stand in his own defense.

The next day, prior to the scheduled time for reconvening the trial, the state requested another in-chambers conference at which it was made clear that if Defendant took the stand he would be cross-examined about the gift

he had offered to Judge Fukuoka. The following conference took place in the presence of Judge Fukuoka, the prosecutor, defense counsel, the clerk and reporter, and Judge Kase Higa, the other Maui Circuit Judge, who was summoned specially for the conference:

> THE COURT: Okay, the record would note, please, that Mr. LaFountaine and Mr. Lowenthal are present with me in chambers.
>
> Yes, Mr. LaFountaine, you asked for this meeting.
>
> MR. LAFOUNTAINE: I'd like to express our intentions at this time and the intentions on the part of the State, that when Rory Mayo, the Defendant testifies, which we've been informed that he will, we intend to cross-examine him in the area of his attempt to deliver something or some type of gift to your Honor, to the Judge of the case; and I want to inform the Court in advance of our intentions in that area.
>
> THE COURT: All right. Now —
>
> MR. LOWENTHAL: I would, of course, object to his offer to proof or offer, you know, to cross-examine on that area. It'll be irrelevant and immaterial in this case.
>
> THE COURT: Uh-huh. Well, I had earlier disclosed to the parties about the incident that happened one or two months ago. With the declaration of intentions on the part of Mr. LaFountaine; and Mr. Lowenthal, I believe has already expressed his intention to use Mr. Mayo, the Defendant as a witness in his own behalf; I find that it's going to be necessary that I, at this point, to disqualify myself from proceeding further with the trial, and will, on that basis call a mistrial.
>
> THE CLERK: Call a what?
>
> THE COURT: Mistrial. And the matter will be transferred down to Judge Higa's Court, courtroom number one.

MR. LOWENTHAL: I'd like the record to reflect that it is over my objection.

I would also like this aspect of the record, I take it, will be — will not be published.

THE COURT: Well, it's — not published now.

MR. LOWENTHAL: Right. Because I feel it certainly would prejudice my client should it appear in the newspaper tomorrow.

MR. LAFOUNTAINE: All I can say is they won't find about it from me.

THE COURT: Okay, so I'll inform the jury.

Appendix B.

The case was thereupon transferred to Judge Higa's calendar, and on June 7, 1979, he granted a motion to dismiss on double jeopardy grounds.

The Hawaii Supreme Court reversed on June 3, 1980, finding that there was "manifest necessity" for a mistrial and therefore no conflict with the prohibition against double jeopardy. *State v. Mayo*, 62 Haw. 108, 612 P.2d 107 (1980). See Appendix C. Petitioner was retried in 1980, but another mistrial was declared because of a hung jury. He was convicted of rape at a third trial and was awaiting sentencing when a habeas corpus petition was filed in the United States District Court.

The United States District Court granted relief under 28 U.S.C. § 2254, holding that manifest necessity for mistrial did not exist. *Mayo v. Attorney General*, 528 F.Supp. 833 (D. Haw. 1981). See Appendix B.

The United States Court of Appeals For the Ninth Circuit summarily affirmed in an order filed November 9, 1982. See Appendix A.

Your Petitioners now seek a Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The Respondent invoked the jurisdiction of the District Court below by a petition pursuant to 28 U.S.C. § 2254.

REASON FOR GRANTING THE WRIT

The Decisions Of The Ninth Circuit And The District Court Raise Important Questions Regarding The Interplay Between The Public Interest In Fair Trials Designed To End In Just Judgments And An Individual Defendant's Right To Have His Trial Completed By A Particular Tribunal; The Overturning Of A Unanimous Hawaii Supreme Court Opinion Also Raises Issues Of Federal-State Comity.

The state court trial judge made a sua sponte declaration of mistrial in direct response to a chain of events set in motion by Respondent's act of offering him a gift. As a result of the holdings of the District Court and Court of Appeals, the State of Hawaii has been deprived of a chance to bring Respondent to justice on the serious charge of rape and kidnapping.

If it is true that Double Jeopardy cases must turn upon their facts, then the underlying inquiry is necessarily whether, under the particular facts of any case, the trial judge abused his discretion. This is, of course, a truism echoed in virtually every case touching upon this issue, but it should sensitize the observer to the very real dilemmas that often arise during the often turbulent flow of a criminal trial. See, *e.g. United States* v. *Jorn*, 400 U.S. 470, 486 (1978). It is for this reason that the court in *Arizona* v. *Washington*, 434 U.S. 497, 511 (1978) chose to give maximum credence to the trial judge's discretion even though other options "might" have been effective:

> We recognize that the extent of the possible bias cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the

> jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment.

Indeed, the court held that the decisions of the trial court are "entitled to special respect" in circumstances not unlike those at bar.

Rather than giving "special respect" to the trial court's evaluation of the case, the District Court and Court of Appeals ruled that the trial judge erred in not considering specific alternatives to declaring a mistrial. See Appendix B. Hawaii contends, however, that the mere existence of possible alternatives does not vitiate manifest necessity, provided that the record indicates that the trial court fairly considered the circumstances and acted reasonably and in the interests of justice. *Arizona* v. *Washington*, 434 U.S. 497 (1978); *United States* v. *Jorn*, 400 U.S. 470 (1971); *Gori* v. *United States*, 367 U.S. 364 (1967).

Unlike the judge in *United States* v. *Jorn*, *supra*, the Hawaii trial judge acted in good faith and in the interests of justice. Even the District Court conceded as much:

> Finally, this Court recognizes that *Judge Fukuoka's decision to terminate the trial was founded on a commendable concern that the impartiality of the proceedings be unimpeached.* As commendable as that motive was, there was a step the judge might have taken, short of declaring a mistrial, that would still have preserved the Petitioner's "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).

528 F.2d at 838. (Emphasis supplied).

Such "commendable concern" is entitled to more weight than was accorded by the federal courts. The mere possibility that other remedies could have been utilized should not control.

It should have been recognized that the courts have uniformly allowed retrial when it is the action of the Defendant that provokes a mistrial. *Arizona* v. *Washington, supra*, looked to improper and prejudicial comments by defense counsel during opening statement, and the court found this sufficient to justify retrial. Where, also, defense counsel's conduct was so outrageous as to cause the trial judge to expel him from the trial and ultimately to declare a mistrial, retrial was proper. *United States* v. *Dinitz*, 424 U.S. 600 (1976). This was also acknowledged in Chief Justice Burger's concurring opinion in *Jorn:*

> I join in the plurality opinion and in the judgment of the Court not without some reluctance, however, since the case represents a plain frustration of the right to have this case tried, attributable solely to the conduct of the trial judge. *If the accused had brought about the erroneous mistrial ruling we would have a different case.*

Id. at 387-388 (Emphasis supplied).

The District Court seemed to look only to the "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). As indicated before, this "valued right" must be seen in the context of *Wade*, which held as follows:

> . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

More recently, the Supreme Court has reaffirmed the "competing and *equally legitimate* demand for public jus-

tice." *Illinois* v. *Somerville*, 410 U.S. 458, 471 (1973) (Emphasis added.) In this case, the first trial had hardly begun before it was terminated, and the burden upon Mayo of a second trial was minimal. The public's interest in bringing Mayo to justice is overwhelming.

Petitioner agrees nevertheless that the defendant's interest in having a single trial to conclusion is a right not to be taken lightly. What this record indicates, however, is an extreme solicitude toward the interests of both the defendant and the public. Petitioner believes that the necessity for a mistrial was indeed manifest, and that the ends of public justice would be defeated if Mayo could not be retried.

CONCLUSION

For the Foregoing reasons, this Petition For Writ of Certiorari should be Granted.

Dated: January 31, 1983, at Honolulu, Hawaii.

Respectfully submitted,

TANY S. HONG
Attorney General
State of Hawaii

JAMES H. DANNENBERG
Deputy Attorney General

COUNSEL OF RECORD
Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDGMENT

No. 81-4678 DC CV 81-0352 SPK

RORY MAYO, *Petitioner-Appellee,*

vs.

ATTORNEY GENERAL, STATE OF HAWAII,

and

KASE HIGA, JUDGE OF THE SECOND CIRCUIT
STATE OF HAWAII, *Respondents-Appellants.*

Filed In The
United States District Court
District of Hawaii
Dec. 6, 1982

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General State of Hawaii
1982 Dec. 8, AM 9:53

APPEAL from the United States District Court for the District of HAWAII.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of HAWAII and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 9, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4678 D.C. No. CV 81-0352 SPK

RORY MAYO, *Petitioner-Appellee,*

vs.

ATTORNEY GENERAL, STATE OF HAWAII,

and

KASE HIGA, JUDGE OF THE SECOND CIRCUIT
STATE OF HAWAII, *Respondents-Appellants.*

ORDER

(FOR PUBLICATION)

FILED
Nov. 9-1982
Phillip B. Winberry
Clerk, U.S. Court of Appeals

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Dept. of Attorney
General State of Hawaii
1982 Dec. 8, AM 9:53

Appeal from the United States District Court
for the District of Hawaii.
Samuel P. King. U.S. District Judge, Presiding
Argued and Submitted August 13, 1982

Before: SCHROEDER, FLETCHER and NORRIS, Circuit Judges.

The Judgment is affirmed for the reasons stated in the district court's opinion. *Mayo* v. *Attorney General, State of Hawaii*, 528 F. Supp. 833 (D. Haw. 1981).

APPENDIX B

UNITED STATES DISTRICT COURT,
D. HAWAII.

Dec. 14, 1981

Civ. No. 81-0352

RORY MAYO, *Petitioner*,

v.

ATTORNEY GENERAL, STATE OF HAWAII,

and

KASE HIGA, CIRCUIT JUDGE OF THE SECOND CIRCUIT STATE OF HAWAII, *Respondents*.

On defendant's petition for a writ of habeas corpus declaring his state court conviction for rape was obtained in violation of his rights under the double jeopardy clause of the Fifth Amendment to the United States Constitution, the District Court, Samuel P. King, Chief Judge, held that fact that defendant would be cross-examined by prosecution on alleged attempt to give trial court judge a gift did not make it manifestly necessary to terminate defendant's first trial in view of fact that any testimony elicited from defendant on cross-examination would have been inadmissible; thus, defendant's second and third trials, and his ultimate conviction, were in violation of his rights under the double jeopardy clause.

Writ granted.

Earle A. Partington, Schweigert & Associates, Honolulu, Hawaii, for petitioner.

James H. Dannenberg, Deputy Atty. Gen., Tany S. Hong, Atty. Gen., State of Hawaii, Honolulu, Hawaii, for respondents.

DECISION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

SAMUEL P. KING, Chief Judge.

Petitioner Mayo seeks issuance of a writ of habeas corpus declaring his conviction for rape in the Circuit Court of the Second Circuit of Hawaii was obtained in violation of his rights under the double jeopardy clause of the Fifth Amendment to the Constitution of the United States [1]

This Court finds that the Petitioner has a valid claim under the Fifth Amendment and hereby grants his petition for a writ of habeas corpus.

FACTS

The Petitioner was indicted for the offenses of rape and kidnapping by a Maui grand jury on September 14, 1978. He pleaded not guilty and trial was set for April 2, 1979. On the morning of April 2, 1979, before trial had begun, the trial judge, the Honorable S. George Fukuoka, called counsel for the defendant and the state into chambers for the following reported conference:

> THE COURT: Okay now, this has to do with a case that's going to trial this morning: Rory Mayo's case. I just remembered it. I'd almost forgotten about it; but I just want to disclose to Counsel about a fact. About a month or two ago, I don't even remember exactly the time, Rory Mayo and a woman friend came to my home to offer me something in a package as a gift. There was no explanation made other than they wanted to give me a gift, and, of course, I declined and said I was in no position to accept anything of that sort. And they kind of, you know, tried to persuade me to accept it, and I finally convinced them that I cannot accept it, and they left.
>
> Now, I don't think it means anything very much but I thought I better let you people know. As a matter of fact, I

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[1] That amendment reads, in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .." U.S.Const.Am. V.

thought about it this morning, and then I thought "Now, should I disclose it before the trial or after the trial?" and I decided I better do it before the trial. So that's it.

MR. LOWENTHAL [defense counsel]: Has it affected your feelings at all about him or the case?

THE COURT: Well, I have feelings about it, but I don't think it will affect the case.

MR. LOWENTHAL: Okay.

THE COURT: Okay, anything else, so long as we're together?

Apparently no objections were made to Judge Fukuoka's sitting on the case.

Following this conference, the jury panel was sworn, voir dire was undertaken by counsel, opening statements were made and two prosecution witnesses were examined. After this, the trial was recessed for the day.

At some point during voir dire or opening statements, defense counsel stated that Mayo would be testifying in his own behalf during the trial.

The next day, before the reconvening of the trial, the state requested another in-chambers conference at which the prosecution advised the judge and defense counsel that, if Mayo were called, he would be cross-examined concerning the gift he offered to the judge. With Judge Fukuoka, the prosecutor, defense counsel, clerk and reporter, and Judge Kase Higa, the other Maui Circuit Judge, present, the following discussion took place:

THE COURT: Okay, the record would note, please, that Mr. LaFountaine [deputy prosecutor] and Mr. Lowenthal are present with me in chambers.

Yes, Mr. LaFountaine, you asked for this meeting.

MR. LAFOUNTAINE: I'd like to express our intentions at this time and the intentions on the part of the State, that when Rory Mayo, the Defendant, testifies, which we've been informed that he will, we intend to cross-examine

him in the area of his attempt to deliver something or some type of gift to your Honor, to the Judge of the case; and I want to inform the Court in advance of our intentions in that area.

THE COURT: All right. Now—

MR. LOWENTHAL: I would, of course, object to his offer to proof *[sic]* or offer, you know, to cross-examine on that area. It'll be irrelevant and immaterial in this case.

THE COURT: Uh-huh. Well, I had earlier disclosed to the parties about the incident that happened one or two months ago. With the declaration of intentions on the part of Mr. LaFountaine; and Mr. Lowenthal, I believe has already expressed his intention to use Mr. Mayo, the Defendant as a witness in his own behalf; I find that it's going to be necessary that I, at this point, to disqualify myself from proceeding further with the trial, and will, on that basis call a mistrial.

THE CLERK: Call a what?

THE COURT: Mistrial. And the matter will be transferred down to Judge Higa's Court, courtroom number one.

MR. LOWENTHAL: I'd like the record to reflect that it is over my objection. I would also like this aspect of the record, I take it, will be—will not be published.

THE COURT: Well, it's—not published now.

MR. LOWENTHAL: Right. Because I feel it certainly would prejudice my client should it appear in the newspaper tomorrow.

MR. LAFOUNTAINE: All I can say is they won't find about it from me.

THE COURT: Okay, so I'll inform the jury.

The case was then transferred to Judge Higa's calendar, and on June 7, 1979, he granted a defense motion to dismiss on double jeopardy grounds.

The Hawaii Supreme Court reversed this dismissal on June 3, 1980, holding that:

> . . . under the circumstances of this case, when it became reasonably clear to the trial judge that defendant intended to testify on his behalf and the State intended to cross-examine defendant on matters involving his participation in the purported gift to the trial judge, in order to attack defendant's credibility because evidence as to his identification was circumstantial, and there is reason to believe that the trial judge could be called as a witness, the trial court did not abuse its discretion in declaring a mistrial sua sponte as there was manifest necessity to do so.

State of Hawaii v. *Mayo*, 62 Haw. 108, 111, 612 P.2d 107 (1980).

In 1980, Mayo was retried, but a hung jury resulted. In 1981, a third trial ended in Mayo's conviction for rape.[2]

DISPOSITION

The Petitioner's suit comes before this Court under 28 U.S.C. § 2254, after Petitioner exxhausted all available state judicial remedies in conformance with that section.

This Court is thus presented with the question whether Petitioner's second and third trials and his ultimate conviction were in violation of the double jeopardy clause.

First, the double jeopardy clause has been held to apply to the states through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Therefore, if Mayo's conviction in state court contravened the strictures of that clause, the conviction cannot stand.

Second, jeopardy initially attached with the swearing in of the jury at the first trial. *See Green* v. *United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 224, 2 L.Ed.2d 199 (1957). Absent a

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[2] Petitioner testified at this third trial. The court granted a defense motion *in limine* to exclude evidence of the alleged gift because its prejudicial value outweighed its probative value.

valid reason for terminating the first trial, Mayo could not then be retried for the same offense.

When the trial judge declares a mistrial *sua sponte* over the defendant's objections, the determination whether there was a valid reason for ending the trial is governed by the manifest necessity test. *Arizona* v. *Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1977); *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L.Ed. 165 (1824) (Story, J.) (first articulation of manifest necessity test).

During the past twenty years or so, there has been substantial judicial exegesis concerning the manifest necessity requirement. Most recently, the Supreme Court has described the test as follows:

> . . . Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of defendant.

Arizona v. *Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 830, 54 L.Ed.2d 717 (1977).

In other words, if there was no manifest necessity to terminate Mayo's first trial, then his subsequent trials and conviction violated the double jeopardy clause.

This Court finds that there was no manifest necessity to terminate Mayo's first trial.

First, there is considerable reason to believe that any testimony elicited from Mayo on cross-examination would have

been inadmissible. Rule 608(b) of the Hawaii Rules of Evidence states that:

> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility. . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, . . . (Emphasis added.)

Although Rule 608 was not promulgated until 1981, the Commentary to the rule indicates that the same principle applied in the common law at the time of Mayo's trial:

> Subsection (b): This allows cross-examination of the witness relative to specific collateral conduct *to the extent that such conduct is relevant to veracity. Such conduct may not be independently proved even if the witness expressly denies it.* Previous law was to the same effect, see *Territory* v. *Goo Wan Hoy*, 24 H. 721, 727 (1919), ...
>
> The rule also applies to any defendant who elects to testify. In *State* v. *Pokini*, 57 H. 17, 22-23, 548 P.2d 1397, 1400-01 (1976), the court observed: "[O]nce having taken the witness stand in his behalf, the defendant may be cross-examined on collateral matters bearing upon his credibility, the same as any other witness . . . . The defendant may be asked questions regarding his occupation or employment . . . *But there are obvious limitation beyond which the court may not allow the examiner to venture. The subject matter of inquiry must have some rational bearing upon the defendant's capacity for truth and veracity* . . .. And where the testimony sought to be elicited is of minimal value on the issue of credibility and comes into direct conflict with the defendant's right to a fair trial, the right of cross-examination into those areas must yield to the overriding requirements of due process. See *State* v. *Santiago*, 53 H. 254, 492 P.2d 657 (1971). . . .." (Emphasis added.)

From the preceding, it is evident that, were Mayo cross-examined, he could not have been questioned concerning his attempt to give Judge Fukuoka a gift, for such evidence would have no bearing upon the "defendant's capacity for truth and

veracity." At most, the prosecution would have been attempting to impeach the credibility of the defendant by bringing in evidence of the defendant's "bad acts." Such evidence is clearly inadmissible.[3]

Moreover, even assuming that the defendant might have been questioned concerning the attempted gift, the rule states flatly that no extrinsic evidence of that conduct would have been admissible. Any attempt to call Judge Fukuoka to testify concerning those events, therefore, would have been unsuccessful.[4]

Second, even if the rules of evidence permitted cross-examination concerning the attempted gift, the record indicates that it was far from certain that the judge would have been called upon to testify. Despite defense counsel's statements that defendant would testify, he was not required to do so and might actually have decided not to testify in the face of the prosecution's stated intention of questioning Mayo about his visit to the judge. More importantly, the judge appears never to have explored with counsel the probability that his testimony would be necessary. The defendant's willingness to

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[3] At the second in-chambers conference, counsel for defendant asserted that he would object to any effort to question the defendant concerning the attempted gift. At Mayo's third trial, such an objection appears to have been sustained.

[4] In addition, this Court believes there is reason to doubt whether the trial judge would have had to testify even if called. Rule 605 of the Hawaii Rules of Evidence declares that: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." Although this rule was not promulgated until January 1, 1981, almost two years after Mayo's first trial, there is substantial authority to support the notion that a judge is incompetent to testify at a trial over which he is presiding. *See, e.g.*, Fed.R.Evid. 605, McCormick, Handbook of the Law of Evidence § 68, at 147 & n.77 & cases cited therein (2d ed. 1972). But *see* 6 Wigmore, Evidence § 1909, *esp.* n.5 & authorities cited therein (Chadbourn rev. 1976).

admit the attempted gift would have, of course, obviated the need for the judge's testimony. That Mayo would not have denied his visit to the judge seems likely, inasmuch as he would have exposed himself to a perjury charge by denying it.

Finally, this Court recognizes that Judge Fukuoka's decision to terminate the trial was founded on a commendable concern that the impartiality of the proceedings be unimpeached. As commendable as that motive was, there was a step the judge might have taken, short of declaring a mistrial, that would still have preserved the Petitioner's "valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949).

Rule 25(a) of the Hawaii Rules of Penal Procedure, in effect at the time of Petitioner's trial, provides that, "[i]f by reason of . . . disqualification, the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial." Thus, it appears that Judge Fukuoka might simply have transferred the trial to another judge without having had to terminate the one before him. Such a procedure would have both effectively prevented any possible taint arising from the Petitioner's attempted gift and also would have made a mistrial unnecessary.

This Court is cognizant of the Supreme Court's command that review of a finding of manifest necessity be tempered by respect for the trial judge's exercise of his discretion, and that an explicit finding of manifest necessity by the trial judge "is not constitutionally mandated." *Arizona* v. *Washington*, 434 U.S. 497, 517, 98 S.Ct. 824, 836, 54 L.Ed.2d 717 (1977). Nevertheless, based on the preceding analysis, this Court finds that inadequate attention was paid at Petitioner's first trial to how the declaration of a mistrial would affect the double jeopardy rights of the accused (*Cf. id.* at 515-16, 98 S.Ct. at 835-36.), or to how a mistrial could be avoided, or to whether a mistrial was in fact necessary. Had these inquiries been undertaken, it

would have become apparent that no manifest necessity existed to declare a mistrial.

Under these circumstances, this Court finds and concludes that Petitioner's second and third trials, and his ultimate conviction, were in violation of his rights under the double jeopardy clause.

THEREFORE, IT IS HEREBY ORDERED THAT Petitioner Mayo's Petition for a Writ of Habeas Corpus is GRANTED AND A WRIT OF HABEAS CORPUS SHALL ISSUE AS PRAYED FOR.

APPENDIX C

SUPREME COURT OF HAWAII

Syllabus

STATE OF HAWAII, *Plaintiff-Appellant*,

vs.

RORY MAYO, *Defendant-Appellee*.

NO. 7447

APPEAL FROM SECOND CIRCUIT COURT
HONORABLE KASE HIGA, JUDGE

JUNE 3, 1980

RICHARDSON, C.J., OGATA, MENOR, LUM, NAKAMURA, JJ.

CRIMINAL LAW — *mistrial — double jeopardy.*

Where a mistrial is declared without the consent of the defendant, and there is an absence of manifest necessity for the mistrial, a retrial will be barred by double jeopardy.

SAME — *same — same.*

Under the circumstances wherein it became reasonably clear to the trial judge that defendant intended to testify on his behalf and the State intended to cross-examine defendant on matters involving his participation in a purported gift to the trial judge, in order to attack defendant's credibility because evidence as to his identification was circumstantial, and there is reason to believe that trial judge could be called as a witness, the trial judge did not abuse his discretion in declaring a mistrial sua sponte as there was manifest necessity to do so.

SAME — *trial court's discretion.*

The trial court's action will not be disturbed on appeal unless there has been a plain and manifest abuse of discretion.

PER CURIAM. The question to be determined by this court is whether defendant may be retried for rape in the first degree, § 707-730(1)(a), HRS, and kidnapping § 707-720(1)(d), HRS, in the face of defendant's allegations that a retrial would subject him to double jeopardy[1] because his first trial was "improperly terminated"[2] by the trial judge who sua sponte declared a mistrial upon the following undisputed facts.

Opinion Of The Court

On April 2, 1979, the first day of defendant's first trial, before the jury panel was sworn, the following colloquy took place in the judge's chambers:

> THE COURT: Okay now, this has to do with a case that's going to trial this morning: Rory Mayo's case. I just remembered it. I'd almost forgotten about it; but I just want to disclose to Counsel about a fact. About a month or two ago, I don't even remember exactly the time, Rory Mayo and a woman friend came to my home to offer me something in a package as a gift. There was no explanation made other than they wanted to give me a gift, and, of

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[1] Fifth amendment, U.S. Constitution, and art. I, § 10, Hawaii State Constitution.

[2] § 701-110 *When prosecution is barred by former prosecution for the same offense.* When a prosecution is for an offense under the same statutory provision and is based on the same facts as a former prosecution, it is barred by the former prosecution under any of the following circumstances:

. . . .

. . . .

. . . .

[4] *The former prosecution was improperly terminated.* Except as provided in this subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper: (Emphasis added.)

course, I declined and said I was in no position to accept anything of that sort. And they kind of, you know, tried to persuade me to accept it, and I finally convinced them that I cannot accept it, and they left.

Now, I don't think it means anything very much but I thought I better let you people know. As a matter of fact, I thought about it this morning, and then I thought "Now, should I disclose it before the trial or after the trial?" and I decided I better do it before the trial. So that's it.

MR. LOWENTHAL: Has it affected your feelings at all about him or the case?

THE COURT: Well, I have feelings about it, but I don't think it will affect the case.

MR. LOWENTHAL: Okay.

THE COURT: Okay, anything else, so long as we're together?

Nothing else was said about the incident until after the State had called two witnesses and before trial resumed the following morning, when Mr. LaFountaine, the prosecutor, requested a conference and the following occurred:

THE COURT: Okay, the record would note, please, that Mr. LaFountaine and Mr. Lowenthal are present with me in chambers.

Yes, Mr. LaFountaine, you asked for this meeting.

MR. LAFOUNTAINE: I'd like to express our intentions at this time and the intensions on the part of the State, that when Rory Mayo, the Defendant testifies, which we've been informed that he will, we intend to cross-examine him on the area of his attempt to deliver something or some type of gift to your Honor, to the Judge of the case; and I want to inform the Court in advance of our intentions in that area.

THE COURT: All right. Now—

MR. LOWENTHAL: I would, of course, object to his offer of proof or offer, you know, to cross-examine on that area. It'll be irrelevant and immaterial in this case.

THE COURT: Uh-huh. Well, I had earlier disclosed to the parties about the incident that happened one or two months ago. With the declaration of intentions on the part of Mr. LaFountaine; and Mr. Lowenthal, I believe has already expressed his intention to use Mr. Mayo, the Defendant as a witness in his own behalf; I find that it's going to be necessary that I, at this point, to disqualify myself from proceeding further with the trial, and will, on that basis call a mistrial.

THE CLERK: Call a what?

THE COURT: Mistrial. And the matter will be transferred down to Judge Higa's Court, courtroom number one.

MR. LOWENTHAL: I'd like the record to reflect that it is over my objection.

I would also like this aspect of the record, I take it, will be — will not be published.

THE COURT: Well, it's — it's not published now.

MR. LOWENTHAL: Right. Because I feel it certainly would prejudice my client should it appear in the newspaper tomorrow.

MR. LAFOUNTAINE: All I can say is they wont' [*sic*] find out about it from me.

THE COURT: Okay, so I'll inform the jury.

In addition, during defense's opening statement, the jury was told that the defense intended to have defendant testify, and during oral argument before this court, defense counsel conceded he would have called defendant to testify because of the circumstantial aspect of the State's case against defendant's identify. The State likewise in its oral argument before this court concurred that it had a circumstantial case against defendant as to his identity.

Upon retrial, a defense motion to dismiss on grounds of double jeopardy was granted. The State appealed. We reverse.

The issue has been narrowed to whether there was an absence of manifest necessity for the sua sponte declaration of a mistrial by the trial judge. For we declared in *State* v. *Pulawa*, 58 Haw. 377, 569 P.2d 900 (1977), that "Where a mistrial is declared without the consent of the defendant, and there is an absence of manifest necessity for the mistrial, a retrial will be barred by double jeopardy."

The thrust of defendant's argument is that the trial court abused its discretion in failing to seek other alternatives before declaring a mistrial, and, therefore, the standard of manifest necessity was not adhered to by the trial judge. We disagree. We hold that under the circumstances of this case, when it became reasonably clear to the trial judge that defendant intended to testify on his behalf and the State intended to cross-examine defendant on matters involving his participation in the purported gift to the trial judge, in order to attack defendant's credibility because evidence as to his identification was circumstantial, and there is reason to believe that the trial judge could be called as a witness, the trial court did not abuse its discretion in declaring a mistrial sua sponte as there was manifest necessity to do so.

Syllabus

The trial court's action will not be disturbed on appeal unless there has been a plain and manifest abuse of discretion, *State* v. *Martin*, 56 Haw. 292, 535 P.2d 127 (1975).

John E. Tam (Ralph R. LaFountaine on the Opening Brief), Deputy Prosecuting Attorneys, County of Maui, for plaintiff-appellant.

Philip H. Lowenthal for defendant-appellee.